TENG HOWE SING

v.

PP

COURT OF APPEAL, PUTRAJAYA
MOHD GHAZALI YUSOFF JCA
KN SEGARA JCA
ABU SAMAH NORDIN JCA
[CRIMINAL APPEAL NO: Q-05-77-03]
10 JUNE 2008

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 371.2 g cannabis - Appeal against conviction and sentence - Whether accused had knowledge that package collected from courier office contained dangerous drugs - Whether learned judge correctly concluded that defence failed to rebut statutory presumption of trafficking*

The accused appealed against his conviction and death sentence for trafficking in 371.2 grammes of cannabis under s. 39B(1)(a) and s. 39B(2) of the Dangerous Drugs Act 1952 ('the Act'). The issue before the court was whether the accused had knowledge that the package he collected from the courier office just before his arrest contained the dangerous drugs in question. The accused claimed that he was an innocent carrier.

Held (dismissing the appeal)
Per KN Segara JCA delivering the judgment of the court:

(1) An appellate court would be slow to disturb a trial court's finding of fact in the absence of any perverse and unwarranted finding on the totality of the evidence before it. The learned trial judge in a carefully considered and well-written judgment made a finding that the accused was in possession of the drugs at the time of his arrest. He made a finding that there was compelling evidence from which it could reasonably be inferred that the accused had knowledge of the incriminatory nature of the contents of the package. This court was in complete agreement with the learned judge in his inference that the accused had knowledge of the contents of the package in custody at the material time. (para 2)

A **(2)** The learned judge considered fully all the evidence given on behalf of the defence. Having weighed it against the prosecution's case he arrived at the correct conclusion that the accused failed to raise any reasonable doubt to show that he was not in actual possession of the package at the material
B time and that he did not know that the package contained drugs. As the weight of the proscribed drugs in the possession of the accused exceeded 200 grammes of cannabis, s. 37 (da)(vi) of the Act triggered the presumption of trafficking in the said drugs against the accused. The learned judge correctly
C concluded that the accused failed to rebut the statutory presumption of trafficking. (para 14)

Bahasa Malaysia *Translation Of Headnotes*

D Tertuduh merayu terhadap sabitan dan hukuman mati yang dijatuhkan ke atasnya kerana mengedar 371.2 gram kanabis di bawah s. 39B(1)(a) dan s. 39B(2) Akta Dadah Berbahaya 1952 ('Akta'). Di hadapan mahkamah, isu yang berbangkit adalah sama ada tertuduh mempunyai pengetahuan bahawa bungkusan yang
E beliau ambil dari pejabat pengantar sejurus sebelum beliau ditangkap mengandungi dadah berbahaya berkenaan. Tertuduh mendakwa bahawa beliau hanyalah seorang pembawa yang tidak berdosa.

Diputuskan (menolak rayuan)

F **Oleh KN Segara HMR menyampaikan penghakiman mahkamah:**

(1) Sebuah mahkamah rayuan akan keberatan untuk mengganggu dapatan fakta yang dibuat oleh mahkamah bicara, dalam
G ketiadaan apa-apa dapatan tidak wajar atau terpesong atas keseluruhan keterangan yang ada di hadapan mahkamah itu. Yang arif hakim bicara di sini, dalam penghakimannya yang penuh hemah dan pertimbangan, telah membuat dapatan bahawa tertuduh mempunyai milikan dadah sewaktu penangkapannya.
H Beliau mendapati bahawa terdapat keterangan yang kukuh dari mana inferens munasabah boleh dibuat bahawa tertuduh mempunyai pengetahuan tentang dadah yang terkandung dalam bungkusan tersebut. Mahkamah ini bersetuju sepenuhnya dengan yang arif hakim berkaitan inferensnya bahawa tertuduh
I mempunyai pengetahuan kandungan bungkusan di bawah kawalannya pada waktu material.

(2) Yang arif hakim telah mempertimbang sepenuhnya segala keterangan yang dikemukakan bagi pihak pembelaan. Dan setelah membandingkannya dengan kes pendakwaan beliau mencapai keputusan yang betul bahawa tertuduh gagal membangkitkan sebarang keraguan munasabah bagi menunjukkan bahawa beliau tidak mempunyai milikan sebenar bungkusan pada waktu material atau tidak mengetahui bahawa bungkusan mengandungi dadah. Oleh kerana berat dadah terlarang melebihi 200 gram kanabis, maka s. 37(da)(vi) Akta telah membangkitkan anggapan pengedaran dadah tersebut terhadap tertuduh. Yang arif hakim telah menyimpulkan dengan betulnya bahawa anggapan statutori pengedaran gagal disangkal oleh tertuduh.

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 37(da)(vi), 39B(1)(a), 39B(2)

For the appellant/accused - Orlando SW Chua; M/s Wong, Orlando Chua & Kuok Advocates
For the respondent/prosecution - Mangai DPP

[Appeal from High Court, Sibu; Criminal Trial No: 47-2-99]

Reported by Usha Thiagarajah

JUDGMENT

KN Segara JCA:

[1] The appellant (accused) was charged for an offence under s. 39B(1)(a) of the Dangerous Drugs Act 1952 punishable under s. 39B(2) of the same Act, that is, for trafficking in 371.2 grammes of cannabis on 17 March 1999 at about 7.50pm, in front of WWW Chat Café, Jalan Kai Peng, Jalan Tuanku Osman, Sibu, Sarawak. The accused was found guilty, convicted and sentenced to death by the High Court at Sibu. This is his appeal.

[2] The issue before this court is relatively simple, that is, did the accused have knowledge that the package he had collected from the courier office, just before his arrest, contained dangerous drugs? This is essentially a question of fact for the trial court to determine upon the facts and inferences surrounding the factual matrix of the case. It is trite law that an appellate court would be slow to disturb a trial court's finding of fact, in the absence of any perverse and unwarranted finding on the totality of the evidence before it to cause a miscarriage of justice. The learned trial court

judge, in a carefully considered and well written judgment, has made a finding that the accused was in possession of the drugs at the time of the arrest. He had made a finding that there was compelling evidence from which it can be reasonably inferred that the accused had knowledge of the incriminatory nature of the contents of the package. Whether the accused had the required knowledge of the thing possessed is a matter of inference from proved facts or as provided by law (statutory presumptions). We have carefully perused the entire record of proceedings of the trial court, found in the record of appeal, and are in complete agreement with the learned trial judge in his inference that the accused had knowledge of the contents of the package, in his custody at the material time. This is what the learned judge said in his grounds of judgment:

> Reverting to the facts of our case, the conduct of the accused in trying to run away and throwing away the package he was carrying on hearing the words "Polis, jangan lari" being shouted at him, coupled with the fact that when he collected the package only a few minutes earlier from the offices of Skynet he had used the name of "Ling Hang Wei" instead of his own name, clearly established a nexus between his conduct, his flight and the offence in question. By using a name other than his own when collecting the package and later by throwing it away when ambushed, the accused had taken steps to conceal his true identity and dissociate himself with what constituted the offence. There was, therefore, clear and compelling evidence from which it can be reasonably inferred that the accused had knowledge of the incriminatory nature of the contents of the package i.e. that it contained drugs.

[3] Briefly, the evidence adduced by the prosecution to prove the charge against the accused is as follows.

[4] On 17 March 1999 at about 6pm ASP Kamaluddin (PW2) led a party of five policemen to lay an ambush at a block of shops situated at Jalan Kai Peng and Jalan Tuanku Osman, Sibu. PW2 positioned his men at strategic places near two business premises, namely, a coffee shop WWW Chat Café and a company offering courier services called Skynet Worldwide Courier Services (Skynet) whose offices were situated on the first or second floor of the block of shops under observation by PW2 and his men. At about 7.50pm PW2 saw two men coming down from the staircase that led to the offices of Skynet. He observed that one of them was thin and tall and wore spectacles. The other person was shorter in stature. These two persons headed towards a motorcycle

parked in front of the WWW Chat Café. PW2 observed that the tall thin bespectacled man was carrying a package. As these two men approached the motorcycle PW2 and his men sprang into action, with him shouting "Polis, jangan lari," whereupon the two men tried to run away, with the thin tall bespectacled man throwing away the package he was carrying. The package fell near the motorcycle. A scuffle then took place after which the two persons were arrested. PW2 testified that when he and his men were trying to effect the arrest and even after their arrest when the police were trying to handcuff them, these two men continued to struggle and appeared scared. The thin tall bespectacled man was identified by PW2 as the accused and the shorter person was identified as Moh Yong Ming (PW12).

[5] After the accused and PW12 were arrested, PW2 picked up the package thrown away by the accused and found it to be a plastic package bearing the logo "Skynet Worldwide Express". He then opened the plastic package in front of the accused. He found an envelope inside it. It was addressed to "Jeffrey Wong Sibu 0168666577 office collection." Written on the reverse side of the envelope were the words "From: Ah Mui No. 38 Jln. SS5/12 P.J. Sel. No. 0198871268." Inside the envelope PW2 found a package wrapped in Chinese newspaper and on unwrapping the newspaper found a plastic container. On opening the container he found another package wrapped in Chinese newspaper bound in cellotape. On opening this package, he found two blocks of compressed dried leaves – one block was larger than the other. PW2 then tore a small opening in the wrapping of the bigger block so that he could smell the contents. It smelt of "Ganja". PW2 suspected the smaller block to be the same. PW2 then seized a bunch of keys from the accused.

[6] PW2 then brought the accused, PW12 and the exhibits he had seized and examined at the scene back to the Central Police Station, Sibu where all the exhibits were marked by him. At the police station the accused was again searched. Three other items were seized from him – (i) Skynet Consignment Note (exh. P4), (ii) a wallet, and (iii) a hand phone.

[7] Abdul Rahman bin Mohd. Sharif (PW11) who was the Branch Manager of Skynet Worldwide Courier Services, Sibu, testified that on 17 March 1999 at about 7.50pm he was in his office at No. 17, Jalan Tuanku Osman, Sibu when the accused came there to collect a package. The accused presented to him a

piece of paper bearing the number 1519527. Abdul Rahman located the package bearing that number and handed it over to the accused. In return, the accused was asked to sign his name, date and time of receipt on one of three carbonized copies of the Consignment Note accompanying the package, which he did. PW11 said the accused was given one copy of the Skynet Consignment Note after he had acknowledged receipt of the package. PW11 testified that the accused signed and wrote his name on the Consignment Note (exh. P4) as "Ling Hang Wei".

[8] The two blocks of compressed dried leaves that were found in the package carried by the accused were subsequently examined by the chemist (PW1). PW1 testified the larger block weighed 342.28 grammes nett while the smaller block weighed 28.84 grammes nett thereby giving a combined nett total weight of 371.12 grammes. He testified the compressed dried leaves, upon his examination and testing, to be cannabis defined in s. 2 of the Dangerous Drugs Act 1952.

[9] At the close of the prosecution's case, bearing in mind the essential ingredients of the charge which the prosecution must prove against the accused, namely,

(1) that at the date, time and place indicated in the charge, the accused did have in his possession dangerous drugs;

(2) that the dangerous drugs found in the possession of the accused is cannabis as defined in s. 2 of the Dangerous Drugs Act 1952;

(3) that the accused did traffic in dangerous drugs;

the learned trial judge was satisfied, that on the evidence adduced, the prosecution had established a *prima facie* case and called upon the accused to enter his defence.

[10] The learned trial judge has considered the defence of the accused very carefully. The accused had given evidence on oath upon his defence being called. In short, his defence was that he was an innocent carrier.

[11] The accused does not deny going to Skynet's office to collect the package in question and that it was in his custody when he was confronted by the police. However, it is his case that he collected the package at the request of a friend called "Ho Seng", and, he did not know that the package contained

dangerous drugs – he thought it contained unlawful goods such as obscene tapes. The accused attempted to show, from the evidence he adduced, that he had a perfectly innocent explanation for the package being in his custody when he was ambushed by the police party, *viz*. he had been asked by his friend "Ho Seng" to collect it from Skynet office. He wanted the trial court to believe "Ho Seng" was not a fictitious person but a former schoolmate of his.

[12] The learned trial judge said that if he believed or accepted the story of the accused regarding "Ho Seng" then it would certainly be evidence supporting his innocence since it would explain why he wrote the name "Ling Hang Wei" on the consignment note. According to the accused, "Ho Seng's" real name is Lim Hang Wei and he had been asked by "Ho Seng" to use his real name when collecting the parcel. If the accused had a perfectly innocent explanation for using another name when collecting the package, then the inference that had been drawn regarding his knowledge of the contents of the package from his having used another name when doing so would certainly stand rebutted.

[13] However, the learned trial judge did not believe the story of the accused regarding "Ho Seng". We have no reason to disturb that finding. This is what he said in his grounds of judgment:

> For the reasons that follow I do not believe the story of the accused regarding "Ho Seng". Since it is the accused's case that he had done all what he did at the request of "Ho Seng" it is logical and reasonable to expect that after his arrest, he would at the earliest opportunity provide all relevant information regarding "Ho Seng" to the police. The accused did have that opportunity when he gave his cautioned statement to the police. In it he revealed the name "Ho Seng" and that he had spoken to "Ho Seng" at least three times on 17 March 1999 but he never gave any further information about "Ho Seng", such as his phone number or any place or places where he could be found at or contacted. In his testimony the accused said that "Ho Seng's telephone number was 016-8666577 but he did not mention this in his cautioned statement. Most importantly, the accused did not reveal that when he referred to "Ho Seng", he was referring to a person by his nickname, and that "Ho Seng's" real name was Ling Hang Wei. Since the accused had set out to make a exculpatory cautioned statement by saying that it was "Ho Seng"

A who had asked him to collect the package, it is only reasonable to expect that if what he said was true, he would also go on to reveal everything he knew about "Ho Seng" in his statement. But he did not do so. The matter does not end there because the accused also had three other opportunities to do so. The
B Investigation Officer Inspector Alekzandra (PW14) testified that he interrogated the accused on three occasions, namely, on 18 March 1999 after the accused was remanded in custody, on 19 March 1999 when the accused was brought out of the lock-up to have his finger prints taken, and on 22 March 1999 after the accused had given his cautioned statement to Inspector Lee, but the
C accused had not revealed the information I have referred to. Although the accused did say that a policeman Corporal Charles Tuoh (now deceased) came to see him in the lock-up after his arrest and in response to a request from Charles Tuoh he had tried, without result, to telephone "Ho Seng" there is no evidence
D that the accused gave any further information to Charles Tuoh about "Ho Seng" than what was revealed by him in his cautioned statement.

…

In my judgment the quality, extent and results of any police
E investigation into "Ho Seng", depended very much on proper information or leads being provided to the police by the accused himself. Since the accused was referring to "Ho Seng" by nickname only it was crucial that he make the police aware of this fact, and since it was the accused who knew the real name of
F "Ho Seng" it was imperative that he informed the police about this too, but he did not. Likewise, it would be the accused himself; who would know who his circle of friends were and who amongst them knew "Ho Seng", whether by his nickname or real name. It was therefore imperative that the accused furnished this information to the police for their investigation purposes but
G without his having done so there is no basis for his complaint about the police investigations.

[14] We are satisfied that the learned trial judge has considered fully all the evidence given on behalf of the defence and having
H weighed it against the prosecution's case he has come to the correct conclusion that the accused has not raised any reasonable doubt to show that the accused was not in actual possession of the package at the material time and that he did not know that the package contained drugs. As the weight of the proscribed
I drugs in the possession of the accused exceeded 200 grammes of

cannabis, s. 37(da)(vi) of the Dangerous Drugs Act 1952 triggered the presumption of trafficking in the said drugs against the accused. The learned trial judge has correctly concluded, that on the evidence before him, the accused has failed to rebut the statutory presumption of trafficking.

[15] We are unanimous that this appeal is without merits. Appeal is dismissed. Conviction and sentence passed by the High Court, Sibu affirmed.